

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

June 22, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 93-1550

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

HACCO, INC.,
a/k/a HOPKINS AGRICULTURAL CHEMICAL CO.
and HOPKINS CHEMICAL COMPANY,
A Wisconsin Corporation,

Petitioner-Appellant,

v.

LABOR AND INDUSTRY REVIEW COMMISSION,
ROSE HORTON,

Respondents-Respondents.

APPEAL from an order of the circuit court for Dane County:
MARK A. FRANKEL, Judge. *Affirmed.*

Before Eich, C.J., Gartzke, P.J., and Sundby, J.

GARTZKE, P.J. HACCO, Inc., also known as Hopkins Agricultural Chemical Company and Hopkins Chemical Company (Hopkins), appeals from an order affirming the decision of the Labor and Industry Review

Commission (LIRC) under the Wisconsin Fair Employment Act (WFEA), §§ 111.31-111.395, STATS. LIRC held that Rose Horton was terminated from her job at Hopkins at least in part in retaliation for her activities opposing alleged sex discrimination at the plant. Hopkins asserts that (1) LIRC's finding that Horton's protected activities were "a determining factor" in her discharge is not supported by substantial evidence in the record, (2) the "in part" or "mixed motive" test is improper under WFEA, and (3) LIRC failed to rule on Hopkins' affirmative defense that Hopkins would have discharged Horton even without a discriminatory motive. We affirm.

The essential facts found by the administrative law judge and adopted by LIRC are as follows. Horton worked for Hopkins from 1974 until her discharge in 1986. For the four years prior to her discharge she was the plant secretary in the Randolph office and reported directly to the plant manager. From May 1984 to April 1, 1986, the plant manager was John Kurth. As of April 1, 1986, Lee Schwalenberg became the plant manager.

Horton supervised Liane Graham who was employed by Hopkins as an office clerk. Throughout 1985 and early 1986 Horton and Graham raised the issue of sex discrimination with Kurth, Schwalenberg, officials of Hopkins and officials of its parent company. By complaining to her supervisors about alleged sex discrimination, Horton engaged in a protected activity under WFEA, §§ 111.31-111.395, STATS.

On July 15, 1986, Horton received a performance evaluation from Schwalenberg concluding that she was "doing an average job." Schwalenberg's evaluation described her as "somewhat independent and a challenge to manage at times," and as someone who presented him "with significantly more problems than solutions." It also raised questions about her loyalty and trustworthiness.

On Thursday, July 17, 1986, Horton arrived at work intending to discuss the evaluation with Schwalenberg but she was so upset about the evaluation that she became physically ill and asked to take a sick day. As she left work she said, "I don't have to put up with this" She took an additional two days of sick leave and two more of previously scheduled vacation days.

On July 24, 1986, Horton returned to work and met with Schwalenberg. He told her that it had been reported to him that on the previous Thursday she had "gone ranting and raving about the building wearing ludicrous clothes and had gone slamming out of the building." Horton denied the accusation. Schwalenberg asked her about her recent sick leave. Horton admitted that during one sick day she had baled hay. Schwalenberg asked her if she had a doctor's excuse for her three-day absence, then went on to discuss her performance evaluation and said he was willing to change the attendance portion on the evaluation because it had been too harsh but he would not change the rest of the evaluation. Horton replied that she was unhappy with the entire evaluation. They continued to discuss the evaluation and both of them became upset. During the discussion Schwalenberg began shouting at Horton. She did not raise her voice. Eventually, Schwalenberg told Horton that he could not tolerate her child-like and unprofessional response to her evaluation, that he could not trust her anymore, and that her job was immediately terminated.

Before her termination, Horton never had a disciplinary action taken against her, and Hopkins had never fired a nonprobationary employee without at least a prior warning. When Schwalenberg terminated Horton's employment, he was aware of her activities in opposing company practices which she felt were based on sex discrimination. He knew this through his conversations and correspondence with Horton and Graham, his communications with Kurth and his involvement in investigating Graham's sex-discrimination complaint.

LIRC found, "A determining factor in Schwalenberg's decision to terminate Horton, on July 24, 1986, was her activities to fight what she believed was sex discrimination within the Hopkins plant at Randolph." LIRC concluded that Horton had proven by a preponderance of the evidence that she was terminated because she opposed discriminatory acts within the meaning of WFEA.

We review LIRC's decision, not that of the trial court. *West Bend Co. v. LIRC*, 149 Wis.2d 110, 117, 438 N.W.2d 823, 827 (1989). LIRC's finding on the motivation of an employer in discharging an employee must be affirmed if supported by substantial evidence. Conversely, we must set aside agency action or remand the case to the agency if we find that the action depends on

any finding of fact that is not supported by substantial evidence in the record. Section 227.57(6), STATS. Substantial evidence is evidence that is relevant, credible, probative and of a quantum upon which a reasonable fact finder could base a conclusion. *Cornwell Personnel Assocs. v. LIRC*, 175 Wis.2d 537, 544, 499 N.W.2d 705, 707 (Ct. App. 1993). When presented with conflicting views of the evidence, it is for the agency to determine which view to accept. *Robertson Transport Co. v. PSC*, 39 Wis.2d 653, 658, 159 N.W.2d 636, 638 (1968).

An employer's motivation is a question of fact, but it is necessarily a factual inference from the predicate facts. LIRC's choice of the predicate facts from which it will draw an inference must be affirmed if substantial evidence establishes those facts, and we must accept LIRC's inferences from the predicate facts, if reasonable, whether or not we would have drawn the same inferences. *Vocational, Technical & Adult Educ., Dist. 13 v. DIHLR*, 76 Wis.2d 230, 240, 251 N.W.2d 41, 46 (1977).

Hopkins asserts that certain predicate facts found by LIRC are not supported by substantial evidence in the record. First, Hopkins takes issue with LIRC's finding that although Horton was angry about her evaluation, her anger was controlled and she did not display it by yelling, slamming doors or any other objectional behavior. But LIRC's finding is a credibility determination, and therefore one which we must accept. *West Bend Co.*, 149 Wis.2d at 117-18, 438 N.W.2d at 827.

Next, Hopkins criticizes LIRC's findings focusing on Kurth's activities with regard to Horton and observes that the findings are irrelevant because Kurth had nothing to do with the decision to discharge Horton. We agree. They are irrelevant. It was Schwalenberg, and not Kurth, who made the decision to terminate her employment.

Hopkins also asserts that its management decisions do not support a reasonable inference of retaliation. We disagree. As LIRC put it in its memorandum opinion,

Although Horton's oppositional activities began in 1985, as late as April 1986 she was continuing her involvement with

such issues, when she and Graham met with Schwalenberg and asked him why their requests for a raise were still being held up because of Graham's discrimination complaint. It was less than three months later that Schwalenberg fired Complainant. The record clearly establishes that Horton engaged in protected oppositional activity, and the proximity in time of the oppositional activity and the discharge is adequate to permit an inference of a connection sufficient to establish the "causal link" necessary to establishment of a prima facie case.

LIRC did not believe Schwalenberg's testimony that he fired Horton because he thought she was overreacting tremendously to her evaluation, not being cooperative, did not want to resolve the issue, and was not even going to discuss it, and that he felt he could not trust her anymore and that the working relationship between them was not going to work out. As LIRC said,

Giving what it considers the appropriate weight to the ability of the Administrative Law Judge to evaluate credibility based on observation of witnesses testifying at hearing, and based as well on its own careful review of the evidence, the Commission determined that it did not believe Schwalenberg. It is persuaded by the evidence that, whether or not he was indeed angry at Horton because of her reaction to his evaluation of her, he also resented her pursuit of claims of sex discrimination against the employer and it was this resentment which lead him to react to the incident concerning the evaluation by terminating Horton.

In short, LIRC drew the inference it chose regarding retaliation because it did not believe Schwalenberg and it believed Horton. Given LIRC's evaluation of Schwalenberg's credibility, a reasonable fact finder could indeed infer that the employer, through Schwalenberg, fired Horton in retaliation for her activities. LIRC is the final evaluator of credibility. *West Bend Co.*, 149 Wis.2d at 118, 438 N.W.2d at 827.

Finally, Hopkins asserts that the chronology of events compels the conclusion that Horton was discharged because of her behavior following her performance evaluation. But given LIRC's evaluation of Schwalenberg's credibility, the weight Hopkins desires to place upon the chronology is not justified.

We now reach the crux of this case. Hopkins contends that the "but for" test, rather than the "in part" test, applies under WFEA. However, we rejected that contention in *Hoell v. LIRC*, 186 Wis.2d 603, 611, 522 N.W.2d 234, 238 (Ct. App. 1994): "[W]e consider it logical to extend the mixed motive test to cases arising out of WFEA." The "mixed motive test" is identical to the "in part" test and contrasts with the "but for" test. As we described it in *Hoell*, "A mixed motive case is one in which the adverse employment decision resulted from a mixture of legitimate business reasons and prohibited discriminatory motives." *Id.* at 608, 522 N.W.2d at 237. Our decision in *Hoell* binds us. See *State v. Solles*, 169 Wis.2d 566, 570, 485 N.W.2d 457, 459 (Ct. App. 1992) (court of appeals bound by its published precedent).

We need not reach Hopkins' contention that because LIRC failed to rule on Hopkins' affirmative defense under the "but for" test and because, in its view, the record does not support a finding that a discriminatory motive was a motive in Horton's discharge, this complaint should be dismissed.

By the Court.--Order affirmed.

Not recommended for publication in the official reports.